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No. 85-1765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BANKERS LIFE AND CASUALTY COMPANY,

Appellant,

v.

LLOYD M. CRENSHAW,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

BRIEF OF AMICUS CURIAE ASSOCIATION OF TRIAL LAWYERS OF AMERICA

ROBERT L. HABUSH
777 East Wisconsin Avenue
Suite 2200
Milwaukee, Wis. 53202
(414) 271-0900
President, Association of Trial Lawyers of America

JEFFREY ROBERT WHITE
Counsel of Record
1050 31st St., N.W.
Washington, D.C. 20007
(202) 965-3500
Attorney for Amicus Curiae

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INTEREST OF AMICUS

The Association of Trial Lawyers of America ["ATLA"] respectfully submits this brief as amicus curiae in support of appellee in this case. Copies of letters from both parties granting their consent to the filing of this brief have been filed with this Court.

ATLA is a voluntary association of approximately 65,000 trial lawyers from every state in the U.S. and several foreign countries. ATLA members primarily represent injured victims of tortious misconduct. ATLA is concerned by the challenge to the punitive damage award presented by appellant and supporting amici in this case. ATLA views the punitive damage remedy as a strong force for safety, individual rights, and corporate good faith.

We are all potential victims of the type of willful or reckless misconduct that punitive damages seek to punish and deter. ATLA believes that limiting the effectiveness of this remedy sacrifices the right of the public to be free of such misconduct to

protect the pockets of those who may seek to profit by such misconduct.

SUMMARY OF ARGUMENT

A Mississippi jury found that Bankers Life and Casualty Co. ("Bankers Life") was guilty of such willful and wanton misconduct in denying Mr. Crenshaw's valid insurance claim that punitive damages were appropriate to punish the company and deter others from engaging in similar misconduct in the future. Bankers Life does not contend that the judgment did not conform to the common law of punitive damages applied by Mississippi courts. Instead, appellant argues that the U.S. Constitution imposes a limit on the amount of punitive damages a state court jury may assess. Specifically, appellant urges this Court to hold that the Excessive Fines Clause of the Eighth Amendment bars an award of punitive damages that is not proportional to the criminal penalty for the same misconduct.

This Court should dismiss this appeal for the fundamental reason that the Excessive Fines Clause does not apply to the states. This Court has never incorporated the Excessive Fines Clause into the Fourteenth Amendment and should not do so here.

The limitation on punitive damages is clearly not essential to an Anglo-American system of ordered liberty. A civil defendant's interest in avoiding large monetary judgments is not particularly weighty. The rule that the jury should fix the appropriate amount of punitive damages, based on the egregiousness of the particular misconduct and the resources of the defendant, has been followed by the great majority of states and recognized by this Court for well over a century. Moreover, state courts and legislatures have effectively protected defendants against excessive awards through other means. Finally, the limitation proposed by Bankers Life is in apparent violation of the right to trial by jury.

In addition, imposing a federal constitutional limit on punitive damages would trample important state interests. Punitive damages are designed to further the social policies that underlie tort law. Making punitive awards predictable in amount would encourage defendants to continue their willful misconduct, treating punitive damage awards as a mere cost of doing business. It would also impair the ability of the states to rely on civil punitive damage awards as a supplement to criminal law enforcement efforts.

Appellant's proposed constitutional rule would also impose onerous burdens upon this Court. To hold that punitive damages are constitutionally equivalent to criminal fines calls into question many other procedural and substantive tort law rules. This Court would be called upon to create a new area of federal punitive damage law under the Eighth Amendment. In addition, this Court would be adding to its docket appeals from all the states presenting fact-bound issues of proportionality of punitive damage judgments.

Even if this Court should determine that the Excessive Fines Clause is applicable to the states, that constitutional provision is limited to fines imposed in criminal proceedings. This Court has held that the Eighth Amendment does not apply to civil actions. There is no support for the notion that the drafters of the Eighth Amendment intended the Excessive Fines Clause to include punitive damages in civil cases. The ban against excessive amercements in the Magna Carta was clearly understood as a limit on criminal punishments, not civil damages. The fact that punitive damages and criminal penalties both seek to punish and deter misconduct does not entitle civil defendants to the safeguards accorded a criminal accused. Civil and criminal proceedings are constitutionally distinct, and there is no basis for requiring plaintiffs in civil actions to comply with constitutional restrictions imposed on the prosecution in criminal cases.

ARGUMENT

I.

THIS COURT SHOULD NOT IMPOSE A FEDERAL CONSTITUTIONAL LIMIT ON PUNITIVE DAMAGES AWARDS IN STATE TORT ACTIONS

A. Appellant seeks to impose a substantive limit on jury verdicts for punitive damages under the Excessive Fines Clause.

It is important to describe precisely the nature of the relief that appellant seeks in this Court. Bankers Life acknowledges that the purpose of punitive damages is to punish and deter misconduct. Appellant does not argue that the judgment against it did not conform to the requirements of state law, nor that the manner in which punitive damages are awarded in Mississippi courts violates procedural due process.[1] Instead, appellant charges that the common-law rule that permits juries to make "subjective" assessments of punitive damages based on the specific misconduct and the wealth of the defendant leads to unpredictable and unduly high verdicts. App. Brief at 12-14. Appellant asserts that the criminal penalty set by the legislature for prosecutions of similar misconduct is the proper objective standard for determining the amount of punitive damages necessary to punish and deter. App. Brief at 35.

Bankers Life does not offer a concrete description of the rule it wishes this Court to impose on the states. A fair reading of appellant's brief is that the trial judge, and then the Mississippi Supreme Court, after reviewing the propriety of the punitive damage verdict under state law, should have determined that Bankers Life could have been fined no more than $1,000 in a criminal prosecution for its misconduct. App. Brief at 14.[2]

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1. Amicus does not address appellant's due process challenge to the retroactive application of a standard of conduct (App. Brief at 40-43) which is limited to the facts of this particular case.

2. Actually, Bankers Life submits that the objective standard of excessiveness should be the *relationship* of the punitive damage award to the monetary criminal penalty for the same or similar misconduct. App. Brief at 35. It is clear

What Bankers Life seeks, essentially, is a substantive cap on punitive damages. The liability insurance industry and other interest groups have proposed damage caps of various sorts as part of an intense lobbying effort for tort "reform" in the state legislatures. *See generally* Demarest and Jones, *Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest*, 18 St. Mary's L.J. 787 (1987); "Both Sides Brace for Tort Battle," National Law Journal, Feb. 16, 1987, at 1. Such caps are generally characterized by a maximum set by the legislature on the amount a jury can award in a common law tort action.[3] The maximum is not based on the evidence before the jury in the particular action, but on extrinsic factors, generally the legislature's desire to protect a class of defendants from the effects of large verdicts. It is worth noting that in its 1986 legislative session, the Mississippi legislature defeated HB 307, which would have limited awards of noneconomic damages, including punitive damages, to $150,000. Bankers Life now offers a similar proposal to this Court in the guise of a constitutional imperative. Appellant would substitute the legislature's judgment as to the monetary amount needed to punish and deter in place of the factual findings of the jury. The only difference is that, instead of applying a cap that was designed by the legislature to limit punitive awards, the court would look to the fines set forth in the criminal code, which were never intended to serve this purpose. Even when imposed by a state legislature after due consideration of the policies involved, such damage caps are of dubious constitutionality.[4] For appellant to urge this Court to

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from appellant's desire for predictability and objective standards, and from the fact that appellant suggests no other factors that might affect the determination, that appellant would expect the reviewing court to treat the maximum criminal fine as the maximum punitive damage award.

3. Damage caps imposed on common-law causes of action should be distinguished from limitations of liability for statutory causes of action, which are well within the province of the legislature.

4. *See Smith* v. *Department of Insurance*, 507 So. 2d 1080 (Fla. 1987) (cap on noneconomic damages violates right of access to the courts); *Carson* v. *Maurer*, 120 N.H. 925, 424 A.2d 825 (1980) (limit on noneconomic damages violates equal protection); *Arneson* v *Olson*, 270 N.W.2d 125 (N.D. 1978) (cap on liability of a physician for medical negligence unfairly discriminates against

impose a legislative limit on punitive damages in spite of the legislature's rejection of that notion shows precious little regard for the legislative judgment that appellant professes to prize so highly. App brief at 35.

The sole source of authority offered by appellant for this dramatic intrusion into state tort law is the Excessive Fines Clause of the Eighth Amendment. Amicus vigorously contests appellant's construction of "fines" in this provision to include punitive damage awards in civil suits. *See* Part II, *infra*. This Court need not reach that issue of constitutional construction, however. Even if appellant's novel reading of the Excessive Fines Clause were correct, its appeal must fail because the Excessive Fines Clause does not apply to the states.

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malpractice victims in violation of equal protection and due process provisions of the state and federal constitutions); *Boyd* v. *Bulala*, 647 F. Supp. 781 (W.D. Va. 1986)(cap on recovery under Virginia's medical malpractice statute violates the victim's right to a jury trial under the U.S. and Virginia Constitutions); *Waggoner* v. *Gibson*, 647 F.Supp. 1102 (N.D. Tex. 1986)(statute limiting medical malpractice recovery to $500,000 violates equal protection under the state and federal constitution and the open courts provision of the state constitution); *Baptist Hosp. of S.E. Texas* v. Baber, 672 S.W.2d 296 (Tex. App. 198-)(limit on damages in malpractice actions against hospitals violates equal protection); *Duren* v. *Suburban Community Hosp.*, 482 N.E.2d 1358 (Ohio C.P. 1985)(cap on general damages in medical malpractice actions violates equal protection guarantees of state and federal constitutions); *Simon* v. *St. Elizabeth Medical Center*, 3 Ohio Ops. 3d 164, 355 N.E.2d 903 (Ohio C.P. 1976)(cap on damages violates equal protection, due process and right to trial by jury); *Graley* v. *Satyatham*, 74 Ohio Ops. 2d 316, 343 N.E.2d 832 (Ohio Ct. C.P. 1976)(similar); *Wright* v. *Central DuPage Hosp.*, 63 Ill. 2d 313, 347 N.E.2d 736 (Ill. 1976)(cap on medical malpractice damages violates state constitutional ban against special legislation); *Jones* v. *State Bd. of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976), cert. den. 431 U.S. 914 (1977)(cap on damages did not violate federal due process or state access to courts; but court remanded to determine whether statute violated prohibition against special legislation. On remand, damages limit held unconstitutional: No. 55527 & 55586 (4th Dist. Ct., Nov. 3, 1980). *Contra*, *Fein* v. *Permanente Med. Group*, 38 Cal. 3d 137, 211 Cal. Rptr. 368, 695 P.2d 665 (1985), app. dism., 106 S. Ct. 214 (1985)(upholding cap on noneconomic damages in medical malpractice cases); *Johnson* v. *St. Vincent Hosp.*, 404 N.E.2d 585 (Ind. 1980)(upholding cap in medical malpractice actions); cf. *Prendergast* v. *Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977)(plurality; only three of seven justices found $500,000 limit on damages constitutional).

B. The Excessive Fines Clause does not apply to the states

The first eight amendments to the U.S. Constitution are a limit on the power of the federal government. Although this Court has applied many of the specific guarantees in the Bill of Rights to the states through the Due Process Clause of the Fourteenth Amendment, this Court has never incorporated the Excessive Fines Clause. *See* L. Tribe, American Constitutional Law 567-68 (1978)(collecting decisions).

The demand that the states comply with a federal constitutional provision is a matter that this Court has never taken lightly. This Court has recognized that the federal government is not the repository of all wisdom. "One of the happy incidents of our federal system," as Justice Brandeis pointed out, is that a state may serve as a "laboratory" in matters of economic and social regulation. *New State Ice Co.* v. *Liebman*, 285 U.S. 262, 280 (1931)(dissenting). The decisions to incorporate many Bill of Rights safeguards did not repudiate this fundamental notion. Rather they illustrate the corollary principle that where the states have shown themselves unwilling or unable to protect fundamental individual rights, this Court will impose federal constitutional safeguards.

Bankers Life does not address the issue of applicability of the Excessive Fines Clause to the states. Appellant's brief makes no effort to sustain the heavy burden of showing that its construction of that provision is not only proper under federal law, but is so fundamental to due process that state courts must also obey its command. For this reason, Amicus suggests that Bankers Life's appeal be dismissed for failure to raise a substantial federal question.

C. The Excessive Fines Clause is not essential to due process

This Court could, of course, address the issue of incorporation on its own. Amicus suggests that a review of the factors that this Court has considered in making this determination leads to the clear conclusion that the Excessive Fines Clause should not be applied to the states.

The precise issue, of course, does not focus on the Excessive Fines Clause in the abstract, but on the specific interpretation of the requirements of that provision. *Malloy* v. *Hogan*, 378 U.S. 1 (1964). Amicus will therefore assume for the sake of this argument that the Excessive Fines Clause means what appellant says it means: Punitive damage awards must be proportional to monetary criminal penalties for the same or similar conduct. This Court's test for determining whether a particular constitutional rule should be incorporated into the Fourteenth Amendment is whether that rule is "necessary to an Anglo-American scheme of ordered liberty." *Duncan* v. *Louisiana*, 391 U.S. 145, 149 n.14 (1968).

The factors that this Court considered in its decision to incorporate the Fourth Amendment exclusionary rule and other constitutional provisions provide a useful paradigm in analyzing the question presented here. In *Mapp* v. *Ohio*, 367 U.S. 1684 (1961), this Court applied the exclusionary rule to the states based on (1) the importance of the interest protected by the rule, 367 U.S. at 656, (2) the fact that the federal government and some states had already adopted the rule, 367 U.S. 659-60, and (3) the experience in the states in protecting the interest by other means, 367 U.S. at 651. In *Mapp*, this Court concluded that since the privacy interest protected by the proposed exclusionary rule was fundamentally important, since the rule had been recognized by the federal government and an increasing number of states, and since other means of protecting privacy had proved futile, the rule should be imposed on the states through the Fourteenth Amendment. These factors recur in other incorporation decisions following *Mapp*. Amicus submits that under this analysis, appellant's proposed application of the Excessive Fines Clause is clearly not an essential element of ordered liberty.

1. No court has adopted the Excessive Fines Clause as a limit on punitive damages.

Appellant is faced with the fact that the rule it seeks to replace is rooted in the tort law system of the great majority of states. The classic formulation of the rule is:

> Punitive damages may be awarded for conduct that in outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of defendant's act, the nature and extent of the harm to the plaintiff that defendant caused or intended to cause, and the wealth of the defendant.

Restatement (Second) of Torts § 908(2)(1977). No state has required that punitive damages be proportional to analogous criminal fines. As Justice Holmes has remarked, "if a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it." *Jackson* v. *Rosenbaum*, 260 U.S. 22 (1922).

Furthermore, this Court has approved the awarding of punitive damages by the jury, at least implicitly, since *Day* v. *Woodworth*, 54 U.S. (13 How.) 363, 371 (1851), where this Court noted that jury awards of punitive damages were "a well-established principle of the common law." In *Smith* v. *Wade*, 461 U.S. 30 (1983), this Court, citing numerous common-law decisions recognizing punitive damages, held that a jury may award punitive damages, under a state standard of reckless indifference, in a federal civil rights action. This Court explained in *Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 269-70 (1981) that by "allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, based on his personal financial resources, the statute [42 U.S.C. § 1983] directly advances the public's interest in preventing repeated constitutional deprivations." As this Court pointed out in *Carlson* v. *Green*, 446 U.S. 14, 22 n.9 (1980), "punitive damages may be the only significant remedy available in some § 1983 actions where constitutional

rights are maliciously violated but the victim cannot prove compensable injury." In *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984), this Court upheld a $10 million punitive damage award as not preempted by the Atomic Energy Act. The Court noted that punitive damages "have long been a part of traditional state tort law" which Congress intended to preserve to provide "adequate remedies for those who are injured by exposure to hazardous materials." 464 U.S. at 255 and 257. The Court rendered these decisions against the backdrop of the basic principle that "the Constitution presents no general bar to the assessment of punitive damages in a civil case." *Curtis Pub. Co.* v. *Butts*, 388 U.S. 139, 159 (1967).[5] It is highly unlikely that this Court should have repeatedly approved punitive damage recoveries that violated fundamental notions of ordered liberty. This Court may be fallible, but does not make it a routine practice.

2. The due process interest involved is not great.

Whether the states must apply a federal constitutional guarantee depends in large part on the nature of the interest at stake. Most of this court's decisions incorporating provisions of the Bill of Rights have protected the life or liberty of criminal defendants or First Amendment speech. This Court has pointed out that, while the parties in a civil suit may be intensely interested in the damages awarded, a defendant's property interest in "mere money" is far less significant in the due process equation. *Addington* v. *Texas*, 441 U.S. 418, 423-24 (1979), *Santosky* v. *Kramer*, 455 U.S. 745, 755-56 (1982).

Bankers Life attempts to bolster the significance of the interest at stake by claiming that punitive damages are wildly out of control. Critics of punitive damages have often resorted to alarmist rhetoric concerning the dire impact of skyrocketing punitive damage verdicts. *See* Daniels, Punitive Damages: Storm on the

5. The First Amendment presents a specific limitation on the use of punitive damages that may inhibit protected speech. *Gertz* v. *Robert Welch, Inc.* 418 U.S. 323 (1974). No First Amendment concerns are presented by the judgment against Bankers Life in this case.

Horizon? 1-3 (American Bar Foundation 1986) (collecting notable examples). But there has been almost no empirical information concerning the impact of such verdicts beyond "anecdotes, horror stories, and surveys of appellate opinions, all of which are guaranteed to produce a distorted (unintentionally, we may assume) picture of things." *Id.* at 5. One commentator, who is otherwise sympathetic to the insurance industry's pleas for "tort reform," admits that "there remains a noticeable lack of statistical data supporting the insurance industry's position regarding the allegedly devastating effects of increased size and frequency of punitive damage awards." Neal, *Punitive Damages: Suggested Reform for an Insurance Problem*, 18 St. Mary's L.J. 1019, 1021 (1987).[6] Recent studies examining awards in selected jurisdictions now reveal what trial lawyers have known all along: Juries do not award punitive damages routinely, and large punitive damage verdicts are quite rare. The most ambitious study, conducted by the Rand Corporation examining 24,000 jury verdicts in San Francisco and Chicago area courts from 1960 to 1984, found that "punitive damages were rarely awarded in personal injury litigation, and when awarded were usually small." M. Peterson, S. Sarma and M. Shanley, Punitive Damages: Empirical Findings vi (Rand Corp. 1987) ["Rand Study"]. The American Bar Association's Special Committee on Punitive Damages, utilizing the Rand data and a 10-state study by the American Bar Foundation, found that most of the increase in punitive damage awards occurred in business and contract cases (including insurance bad-

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6. Commentators more sympathetic to the interests of consumers and potential tort victims take a decidedly less sanguine approach to the purported "crisis" in tort litigation. The latest data reveals that the liability insurance industry has remained quite profitable and that the purported "crisis" has less to do with verdicts than with insurance company greed and mismanagement and the cyclical nature of the industry. See National Association of Attorneys General, An Analysis of the Causes of the Current Crisis of Unavailability and Unaffordability of Liability Insurance (May 1986); Nader, *The Corporate Drive to Restrict Their Victims' Rights*, 22 Gonzaga L. Rev. 15 (1986/87); Schroeter and Rutzick, *Being an Insurance Company Means Never Having to Say You're Sorry*, 22 Gonzaga L. Rev. 31 (1986/87); "The Manufactured Crisis: Liability-Insurance Companies Have Created a Crisis and Dumped It On You," 51 Consumer Reports 544 (Aug. 1986).

faith cases). Awards in personal injury cases, the target of most criticism, have remained relatively stable in frequency and amount during 1960 to 1984. Punitive Damages: A Constructive Examination 2-2 to 2-5 (American Bar Association 1986) ["ABA Report"]. An independent statistical survey of reported punitive damage decisions confirms that "such awards seem to be neither frequent nor crushing in any absolute sense." Landes and Posner, *New Light on Punitive Damages*, Regulation 33 (Sept./Oct. 1986) Amicus will not burden this Court with the considerable amount of statistical data underlying these conclusions and readily concedes that none of the studies purports to present a conclusive picture of punitive damage verdicts across the country. Amicus does submit, however, that the best existing evidence reveals no "crisis" that might conceivably warrant a federal constitutional limitation on punitive damage verdicts.

3. The states adequately protect the due process interests of defendants.

Another factor that this Court's has looked to is whether the states adequately protect the defendant's interest by other means. For example, this Court did not compel the states to apply the exclusionary rule under the Fourth Amendment until it was clear that alternative state methods of protecting privacy interests were ineffective. *Mapp* v. *Ohio*, 367 U.S. 643, 651-53 (1961). Conversely, this Court declined to extend the cruel and unusual punishment clause to school punishment, in part, because existing state common-law remedies were sufficient to protect the liberty interests of school children. *Ingraham* v. *Wright*, 430 U.S. 651, 677-79 (1977).

Appellant asserts that defendants may be subjected to excessive punitive damage awards because juries "impose crushing financial burdens for the most whimsical of reasons." App. Brief at 8. Amicus agrees that juries should be instructed concerning the specific factors which they may consider in assessing punitive damages. The courts can readily correct any deficiency in this area. *See, e.g., Wangen* v. *Ford Motor Co.*, 97 Wis. 2d 260, 295,

294 N.W.2d 437, 460 (1980) (listing seven specific factors that the jury must be instructed to consider). Imposing a constitutional limit on the maximum award does nothing to further this goal.

More importantly, appellant makes the mistake of looking at punitive damages in a vacuum. Trial and appellate judges bear the responsibility of reviewing punitive damage awards for excessiveness. In a leading decision, the Wisconsin Supreme Court stated that "judicial controls . . . will provide for fair administration of punitive damage awards in this state." *Wangen* v. *Ford Motor Co.*, 97 Wis. 2d 260, 298, 294 N.W.2d 437, 457 (1980). Amicus submits that these controls adequately protect defendants against excessive punitive damage verdicts, rendering a federal constitutional limitation an unnecessary intrusion into state tort law.

Appellant's concern that punitive damages may be "employed to punish unpopular defendants," (App. Brief at 13) is misplaced. A jury may assess punitive damages only after finding the defendant liable for a recognized tort and guilty of willful or reckless misconduct. Even then, a trial judge or appellate court must reverse or reduce the award if it was based on passion or prejudice. 2 Ghiardi and Kircher, Punitive Damages Law and Practice § 18.07 (1985); *see, e.g., Burnett* v. *National Enquirer, Inc.*, 144 Cal. App. 3d 991, 193 Cal. Rptr. 206 (1983) (remittitur of $1.3 million verdict to $150,000).

Appellant strenuously objects to the notion that juries base their assessment on the proper amount of damages on the wealth of the defendant. Appellant overlooks the fact that this principle protects the rights of defendants. The universally-accepted corollary of this principle is that: "Punitive damages should be painful enough to provide some retribution and deterrence, but should not be allowed to destroy the defendant." *Arab Termite & Pest Control* v. *Jenkins*, 409 So.2d 1039, 1043 (Fla. 1982). Courts routinely order remittiturs on the ground that punitive damage awards must not be allowed to bankrupt the defendant. *See In re "Dalkon Shield" Products Liability Litigation*, 526 F.

Supp. 887, 899 (N.D. Cal. 1981), *vac. other grnds.* 693 F.2d 847 (9th Cir. 1982), *cert. den.* 459 U.S. 1117 (1983); *Maxey* v. *Freightliner Corp.*, 450 F. Supp. 955, 960-61 (N.D. Tex. 1978), *rev'd other grnds.* 665 F.2d 1367 (5th Cir. 1982); *Morris* v. *Parke Davis, Inc.*, 573 F. Supp. 1324, 1327-28 (C.D. Cal. 1983); *Thiry* v. *Johns Manville Corp.*, 661 P.2d 515, 518 (Okla. 1985); *Grimshaw* v. *Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981). It is more likely that large compensatory awards, which are not assessed in relation to defendant's ability to pay, could bankrupt a defendant.

These standards of review do not merely exist on paper. Courts are becoming increasingly stringent in reviewing punitive awards. "[T]here appears to be a growing trend to subject such awards to greater judicial scrutiny." Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 44 (1982). A study of the subsequent history of punitive damage verdicts found that 50% of jury verdicts were reduced by remittitur or settlement. For the largest awards, the number was 80%. ABA Report, *supra*, at 2-5. *See also* Rand Study, *supra*, at 30. As one court notes, "judicial scrutiny over the awards provides a partial justification for allowing such awards in the first place. The spectre of bankruptcy and excessive punishment can be in part dispelled to the extent that trial and appellate courts exercise their powers of review." *Sturm, Ruger & Co.* v. *Day*, 594 P.2d 38, 48 (Alaska 1979).

It is Amicus' position that the common-law rules governing punitive damages represent the most effective way for states to further the goals of tort law in protecting citizens from socially undesirable conduct in a manner that is not arbitrary or unfair to defendants. If a different balance should be struck more favorable to the interests of defendants, it is for the states to strike it. Several state courts, for example, have required plaintiffs to prove misconduct by clear and convincing evidence. *Tuttle* v. *Raymond*, 494 A.2d 1353 (Me. 1985); *Travelers Indem. Co.* v. *Armstrong*, 442 N.E.2d 349 (Ind. 1982); *Wangen* v. *Ford Motor Co.*, 97 Wis.2d 260, 298, 294 N.W.2d 437, 457 (1980).

Of particular significance is the fact that state legislatures have been actively addressing the concerns raised by defendants. In 1986 alone, nine states enacted modifications of laws relating to punitive damages, including raising the quantum of proof required of plaintiffs, setting a ratio between the punitive award and compensatory damages, and providing that a portion of awards be paid to public funds. See ABA Report, *supra*, at 1-5 (collecting statutes).

It is clear that the states are performing their function as laboratories and that they are fully protecting the interests of defendants against liability for excessive punitive damage awards. Imposition of a federal constitutional mandate is unwarranted.

4. The proposed application of the Excessive Fines Clause is in apparent violation of the right to trial by jury.

As amicus previously noted, the limitation on punitive damages that Bankers Life seeks to impose under the Excessive Fines Clause is essentially a cap on damages. It substitutes the judgment of the legislature for that of the jury in a civil action. Amicus contends that such a limitation violates the plaintiff's right to trial by jury under the Seventh Amendment and/or substantially similar guarantees under the state constitutions. The Seventh Amendment provides:

> In suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury shall otherwise be re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Const., amend VII.

A federal district court presented with this precise issue found that a Virginia statute which imposed a monetary limit on medical malpractice damages was unconstitutional. *Boyd* v. *Bulala*, 647 F. Supp. 781 (W.D. Va. 1986). The court's analysis is a focused and principled application of the right to trial by jury which is worth examining in some detail:

"The federal right to a civil jury trial is limited to those actions in which the right to jury trial existed at common law and actions where Congress specifically provides for a jury by statute. *Ex Parte Peterson*, 253 U.S. 300, 40 S. Ct. 543, 64 L. Ed. 919 (1919). In such actions the seventh amendment prohibits interference with the ultimate determination of issues of fact by the jury. *Id.* at 310, 40 S. Ct. 546. Specifically, the amendment provides the right to have a jury properly determine not only the question of liability but also the extent of damages. *Dimick* v. *Schiedt*, 293 U.S. 474, 486, 55 S. Ct. 269, 301, 79 L. Ed.2d 603 (1935)." The Virginia damage cap "infringes strongly on the fact-finding function of the jury in assessing appropriate damages. Since the assessment of damages is a fact issue committed to the jury for resolution, a limitation on the performance of that function is a limitation on the role of the jury. Since the right to a jury is guaranteed under the seventh amendment, it therefore follows that such a limitation is unconstitutional under the provisions of that amendment." The court further explained that the statute "would require the court to ignore a verdict in an amount above the cap which is supported by the evidence and instead enter judgment for the cap amount. This extraordinary requirement bears no relation to the doctrines of remittitur, new trial, and judgment notwithstanding the verdict, and it cannot be founded upon the court's inherent power over verdicts and judgments. Indeed, there exists no permissible basis for entering a judgment predetermined by the legislature in place of a judgment on a verdict properly reached by a jury." The court concluded: "The legislature may not mandate the amount of judgment to be entered in a trial."

647 F. Supp. at 788-90.

In *Smith* v. *Dept of Insurance*, 507 So.2d 1080 (Fla. 1987) the Florida Supreme Court also found that a cap on noneconomic damages violated the state guarantee of access to the courts. "Nor, we add, because the jury verdict is being capped, is the plaintiff receiving the constitutional benefit of a jury trial as we have heretofore understood that right." Slip op. at 12.

The Seventh Amendment right to a civil jury trial has not been incorporated into the Fourteenth Amendment and so does not govern this case. What amicus suggests, however, is that a cap on damages which substitutes legislative standards for the findings of a jury in a common law action is so clearly violative of the right to a jury trial in the federal and state constitutions, along with the state constitutional right of access to the courts, that such a limitation cannot possibly be deemed essential to Anglo-American scheme of justice.

D. Imposition of limits on the amount of punitive damage awards would seriously undermine important state interests.

1. Jury assessments of punitive damages serve important social policies underlying tort law.

Tort law, generally speaking, is state law. Bankers Life mistakenly characterizes tort law as merely a system for compensating injured victims. The states bear the responsibility of delineating the duties and standards of conduct that citizens may reasonably expect to render and receive. An aggrieved plaintiff must not only establish causation, but also a breach of duty. In this manner, compensatory damages also serve to punish and deter undesirable conduct. These duties do not remain static, but evolve to reflect the social values, economic conditions, and technological advances of the time.

Compensatory damages alone are not always adequate to serve these policies. Recent developments in the law of torts have focused on protecting the rights of consumers against corporate entities that enjoy vastly superior bargaining power in the marketplace. Products liability and insurance bad-faith actions are primary examples of this evolution. Punitive damages play an important role in securing the policies that led the states to adopt these causes of action.

Products liability law, for example, is concerned not only with compensating injured victims of defective products, but also with keeping unreasonably dangerous products off the market in the

first place. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 826 (1973). The problem is that "the principles of strict liability are ill-equipped to deal with problems at the other end of the culpability scale where an injury results when a manufacturer markets its products in an intentional or reckless disregard for consumer safety. Nor has the criminal law filled this void. A legal tool is needed that will help to expose this type of gross misconduct, punish those manufacturers guilty of such flagrant misbehavior, and deter all manufacturers from acting with similar disregard for the public welfare. The punitive damages remedy is such a tool." Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1258, 1259-60 (1976). An excellent example is provided by the Pinto experience. Ford Motor Company had explicitly anticipated that 180 people would die and 180 others would be seriously burned each year due to the vulnerability of the Pinto's fuel system to rear-end impact. After estimating the amount of compensatory damages Ford might be expected to pay, the company found it was cheaper to pay the compensatory damages than to invest about $11 per car to make the fuel system safer. *See Grimshaw* v. *Ford Motor Co.*, 119 Cal. App. 3d 757, 800, 174 Cal. Rptr. 348, 376 (1981). The predictability of compensatory liability permits an unscrupulous manufacturer to simply internalize such awards as a cost of doing business. By deciding not to invest in safety, such a manufacturer can achieve a price advantage over more safety-conscious competitors. It is estimated, for example, that Ford saved some $200 million by delaying fuel-system safety and using its influence to postpone federal regulations. *Ford Motor Co.* v. *Durrill*, 714 S.W.2d 329 (Tex. App. 1986). A rule that makes punitive damages similarly predictable would seriously undermine the social goals that led the courts to adopt strict liability in the first place.

Similarly, the fairly recent adoption of the tort of bad-faith denial of insurance claims recognizes that an unscrupulous insurer whose liability is limited to compensatory damages has a financial incentive to improperly deny claims with the expectation

that most insureds will not sue and that the profits will offset compensatory liability. Indeed, the Mississippi Supreme Court indicates that this is precisely the course that Bankers Life was following in this instance. *See Bankers Life & Cas. Co.* v. *Crenshaw*, 483 So.2d 254, 271 (Miss. 1985) Punitive damages has been shown to deter such outrageous misconduct toward the consumer. *See* Levine, *Demonstrating and Preserving the Deterrent Effect of Punitive Damages in Insurance Bad Faith Actions*, 13 U.S.F.L. Rev. 613 (1979). As the Mississippi court concluded in this case, "Conduct of an insurance company not authorized by law which carries with it a potentiality of great harm to the insurance public is an outrage, and should be condemned. Punitive damages in such a case is an appropriate, and perhaps the only remedy. In this kind of case, it is the medicine most likely to cure the malady." *Bankers Life & Cas. Co.* v. *Crenshaw*, 483 So. 2d 254, 276 (Miss. 1985).

The fact that a wrongdoer cannot predict his potential exposure to punitive damages before embarking on willful or reckless misconduct is not a vice, but a virtue that serves the purposes of the substantive law of torts. If such a remedy did not exist, tort law would have to invent it. This Court should not undermine the important objectives of tort law by neutralizing an important tool available to the states.

2. Punitive damages further the state's interest in enforcing its criminal law.

The fact that punitive damages seek to punish and deter misconduct does not set them in conflict with the criminal law. Punitive damages offer an effective supplement to criminal law enforcement. Mallor and Roberts, *Punitive Damages: Toward a Principled Approach*, 31 Hastings L.J. 639, 657-58 (1980). Criminal sanctions are often too low to represent an adequate deterrence to corporate wrongdoers. In *Grimshaw*, *supra*, the California Court of Appeal rejected Ford's complaint that the

punitive damage award was disproportionate to penalties for violation of the Vehicle Code. The court pointed out that the maximum penalties under the state code provisions were $50 and $100. The court's answer is directly responsive to appellant's contentions here:

> It is precisely because monetary penalties under government regulations prescribing business standards or the criminal law are so inadequate and ineffective as deterrents against a manufacturer and distributor of defective products that punitive damages must be of sufficient amount to discourage such practices. Instead of showing that the punitive damage award was excessive, the comparison between the award and the maximum penalties under state and federal statutes and regulations governing automotive safety demonstrates the propriety of the amount of punitive damages awarded.

119 Cal. App.3d at 810, 174 Cal. Rptr. at 389.

Moreover, the likelihood of criminal punishment for many types of corporate misconduct is slim indeed. The states do not possess the resources for enforcing criminal sanctions against all such misconduct. The Pinto experience again provides an excellent object lesson. After three women died in a fiery crash, an Indiana prosecutor brought homicide charges against the company. The maximum penalty faced by Ford was $10,000 for each death. Ford spent an estimated $1 million to defend the case; the prosecution spent $40,000, twice its entire annual budget. Ford was acquitted. *See* "How Ford Won Pinto Trial," *National Law Journal*, Mar. 24, 1980, at 1. The states must be able to rely on private tort actions to supplement its law enforcement efforts. This Court similarly recognized that the treble damage remedy for antitrust violations is a significant supplement to the limited resources of the Justice Department. *Reiter* v. *Sonotone Corp.*, 442 U.S. 330 (1979).

Appellant's proposal to set a federal limitation on the amount of punitive damages does not simply reduce a "windfall" to private plaintiffs. It severely undermines the public policy objective

of the states. Principles of federalism should lead this Court to reject such an intrusion on the interests of the states.

E. A federal constitutional limit on damages would impose a severe burden on this Court.

Bankers Life presents its proposed rule in deceptively simple terms: Merely look to the criminal fine for the same conduct and strike the excess. In fact, there is no precise correlation between torts and crimes. Some tortious misconduct may not be criminal at all; other wrongs may fit within a variety of criminal offenses. Bankers Life itself suggests some difficulty in determining the proper criminal provision applicable to its conduct in this case. App. Brief at 35 n.18. Should a drunk driver who kills a pedestrian be subject to punitive damages up to the maximum fine for driving while intoxicated, or that for negligent homicide? By asking this Court to impose a federal constitutional standard that is utterly lacking in precedent, appellant presumes that this Court is willing and able to undertake the burden of creating and construing an entirely new federal law of punitive damages. Further, as this Court recognized in *Solem* v. *Helm*, 463 U.S. 277, 290 n.17 (1983), the proportionality analysis is inherently fact-bound. Appellant proposes that this Court entertain federal question appeals on a continuing basis from punitive damage verdicts around the country.

Amicus suggests that the interest of Bankers Life in placing a federal limit on the amount of punitive damages it may be required to pay for its misconduct does not justify the substantial increase in this Court's workload.

II.
THE EXCESSIVE FINES CLAUSE DOES NOT APPLY TO PUNITIVE DAMAGE AWARDS IN CIVIL CASES

If this Court determines that the Excessive Fines Clause applies to the states, the Court faces the issue that was assumed in Part I: Does the Excessive Fines Clause apply to punitive damage

awards? Amicus submits that the Eighth Amendment's protection against excessive fines is a limit on the power of the government to punish crimes. It extends only to the punishment imposed on one convicted of a crime by a court exercising its criminal jurisdictional power. It does not apply to damage awards of any kind in private civil suits.

A. The Eighth Amendment does not apply to civil damages.

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., amend. VIII. An early decision by this Court held that the Excessive Fines clause is addressed to federal courts in the exercise of their criminal jurisdiction. *Ex Parte* Watkins, 32 U.S. 568 (1833).

In *Ingraham* v. *Wright*, 430 U.S. 651 (1977), where this Court declined to extend the guarantee against cruel and unusual punishment to corporal punishment in the schools, the Court clearly defined the boundaries of the Eighth Amendment.

> Bail, fines, and punishment traditionally have been associated with the criminal process, and by subjecting the three to parallel limitations, the text of the Amendment suggests an intention to limit the power of those entrusted with the criminal-law function of government. An examination of the history of the Amendment and the decisions of this Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes.

430 U.S. at 664. This Court reaffirmed its view that the plain meaning of the text of the Eight Amendment imposed parallel limitations on criminal punishments in *Solem* v. *Helm*, 463 U.S. 277, 289 (1983).

Appellant places a great deal of emphasis on dicta in *Ingraham* that some punishments not labelled criminal by the state may be sufficiently analogous to justify application of the Eighth Amendment. 430 U.S. at 669 n.37. The Court referred to actions for involuntary commitment in mental or juvenile institutions.

These are governmental deprivations of personal liberty authorized by statute. Nothing in the Court's footnote provides any support for the notion that an element of damages in a lawsuit based on a common-law cause of action could ever be subject to the Eighth Amendment.

Bankers Life also relies on the absence of any express language limiting the Eighth Amendment to criminal cases. App. Brief at 18. Appellant acknowledges that the English Bill of Rights of 1689 is an important source in determining the meaning of the Eight Amendment. App. Brief at 20-21. Bankers Life ignores this Court's explanation that although original draft of the English Bill of Rights expressly limited to criminal cases, and reference to "criminal cases" was eliminated from the final draft, "the preservation of a similar reference in the preamble indicates that the deletion was without substantive significance." *Ingraham* v. *Wright*, 430 U.S. at 665.

B. The Framers of the Constitution did not intend the Excessive Fines Clause as a limitation on civil damage awards.

Despite this Court's clear ruling that the Eighth Amendment extends only to criminal cases, Bankers Life argues that the Framers intended the Excessive Fines Clause to limit any monetary penalty, civil or criminal, imposed for the purpose of punishment and deterrence. Bankers Life acknowledges that the evidence of the intent of the Framers is "scant." Appellant therefore harkens back to the mists of Runnymede and Chapter 20 of the Magna Carta. That chapter reads:

> A freemar shall not be amerced for a small offence, except in accordance with the degree of the offence; and for grave offence he shall be amerced in accordance with the gravity of his offence . . .

Appellant argues that "modern-day punitive damage awards are virtually indistinguishable from amercements in theory and in practice and therefore would have been regarded by the Framers and the colonists as being controlled in their size by the Excessive

Fines Clause." App. Brief at 24. This statement reveals an ignorance of history of considerable depth. Appellant ignores this Court's gently understated reminder that the distinction between civil and criminal "is of some constitutional import." *United States* v. *Ward*, 448 U.S. 242, 249 (1980). The distinction is fundamental. Civil lawsuits are essentially disputes between private parties for which the state provides an arena but which do not implicate the power of the state. Criminal prosecutions represent the ultimate exercise of the sovereign's power over the individual. The barons who confronted King John in 1215 were not a committee seeking tort reform; They sought to confine the sovereign power of the king.

Amercements were, essentially, criminal fines. They were "a pecuniary mulct laid upon an individual who had offended the king." T. Taswell-Langmead, English Constitutional History 92 (1905). The distinction between grave offenses and small offenses reflected the distinction between felonies and misdemeanor crimes. 2 J. Stephen, History of the Criminal Law of England 198 (1883). These misdemeanors included misconduct by parties in connection with judicial actions, such as false swearing and failure to prosecute a claim. *Id.* The amounts were payable to the king.

As this Court explained in *Solem* v. *Helm*, 463 U.S. 277 (1983) "An amercement was similar to the modern day fine. It was the most common criminal sanction in 13th-Century England. See 2 F. Pollock and F. Maitland, The History of English Law 513-515 (2d ed. 1909)." 463 U.S. at 284 n.8. The amercements chapters of the Magna Carta were limitations solely on the criminal power of the king.

Appellant's assertion that the amercements chapters were applied to civil as well as criminal penalties is plainly wrong. Appellant's sole support for that assertion is a misquoted sentence from Blackstone:

> The reasonableness of fines in criminal cases has also been usually regulated by the determination of Magna Carta, concerning amercements for misbehavior *of the suitors* in matters of civil right. (Emphasis added)

4 W. Blackstone, Commentaries on the Laws of England *379 (miscited as *372 at App. Brief 27). In quoting this sentence at page 27 of its brief, Bankers Life omitted the words "of the suitors," a crucial phrase which reveals that Blackstone was referring to those misdemeanors such as false swearing or failure to prosecute, not to torts against the opposing party. The examples cited from Blackstone in which private litigants would have been required to pay a fine to the king as well as compensation to the plaintiff, App. Brief at 27, merely reflect the fact that until 1694, the criminal and civil jurisdictions were not separated. W. Prosser, Torts 8 (4th ed. 1971). This Court has had occasion to interpret the same passage and came to opposite conclusion from appellant's. "Thus, Blackstone treated each of the provision's three prohibitions as bearing only on criminal proceedings and judgments. 4 Blackstone's Commentaries *297 (bail) *379 (fines and other punishments)." *Ingraham* v. *Wright*, 430 U.S. 651, 665 (1977).

It is clear that the Framers of the Excessive Fines Clause would have viewed the Magna Carta's provisions relating to amercements as applicable only to fines imposed by the state upon an individual convicted of a crime.

To the extent that the Framers gave any thought to punitive damage awards in tort actions, it is likely that they would have viewed such awards as essentially compensatory. As Bankers Life recognizes [App. Brief at 29], the English decisions that first set forth the notion of punitive damages rationalized them as compensatory. See also K. Redden, Punitive Damages § 2.2 (1980). As appellant admits, the notions of punishment and deterrence did not become the dominant justification for punitive damages until well into the 19th Century. App. Brief at 30. There is no basis for appellant's assumption that the drafters implicitly included punitive damage awards in their use of the word "fine."

C. Punitive Damages are not constitutionally equivalent to criminal fines.

Bankers Life and amicus Alliance of American Insurers, argue that since punitive damages serve the same function as criminal fines, they should be subject to the same safeguards. From the point of view of the corporate defendant and the impact of the penalty on corporate conduct, this may be true. It is a policy consideration that may be considered by a legislature in modifying common law remedies. The issue before this Court, however, concerns the constitutional boundaries of the power of the courts. In that analysis, the distinction between civil and criminal penalties is fundamental.

The reliance by amici on *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963) is clearly misplaced. The Court set out a test for making the sometimes elusive determination of whether a statutory action brought by the government seeks a criminal or civil, i.e. regulatory, penalty. A perceptive rebuttal to this argument is made in Note, *In Defense of Punitive Damages*, 55 N.Y.U.L. Rev. 303, 331-37 (1980). *Kennedy* is not concerned with the elements of damages in common-law actions. In the rare instance in which this Court found it necessary to make such a distinction, the Court has squarely held that punitive damages are civil. *Huntington* v. *Atrill*, 146 U.S. 657 (1892) (holding that, for purposes of the rule that a state will not enforce foreign criminal judgments, punitive damage judgments are civil) *See Holbein* v. *Rigot*, 245 So.2d 57 (Fla. 1971).

A court may impose a criminal penalty only in a proceeding brought by the state properly invoking the criminal jurisdiction of the court. A claim for punitive damages is not a separate cause of action. It is merely an element of damages that a plaintiff can recover after establishing defendant's liability for a recognized tort. A court simply has no power to impose a criminal penalty in a civil action. *Palmer* v. *A.H. Robins Co.*, 684 P.2d 187, 214 (Colo. 1984).

Moreover, the interests at stake in a criminal action are fundamentally different. The criminal defendant faces the investigatory and prosecutorial resources of the state. He is often indigent and represented by appointed counsel. The parties in a civil suit may be deemed to be on equal footing. Often, as in this case, the defendant is possessed of considerable financial and legal resources. There is no basis for requiring the injured plaintiff to meet the constitutional standards imposed on the prosecution in criminal cases.

CONCLUSION

To avoid paying the judgment rendered against it by the Mississippi court, Bankers Life is willing to unravel a great deal of constitutional law. Appellant's novel proposal violates notions of federalism and blurs the constitutional distinction between civil and criminal law. It has no support in history, precedent, or policy. Amicus submits that this Court should dismiss this appeal or affirm the judgment of the Mississippi Supreme Court.

Respectfully submitted,

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JEFFREY ROBERT WHITE
Counsel of Record
1050 31st St., N.W.
Washington, D.C. 20007
(202) 965-3500
Attorney for Amicus Curiae

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